

MEMORANDUM OF LAW

DATE: August 31, 1987

TO: Ron Buckley, Secretary to the Historical Site
Board, Planning Department
FROM: City Attorney
SUBJECT: California Environmental Quality Act (CEQA)
Review of Project Prior to Historical Site
Board Action

By memorandum to this office dated August 12, 1987, you requested this office to confirm your conclusion respecting the applicability of the California Environmental Quality Act ("CEQA"), California Public Resources Code Sections 21000 et seq., to a proposed high-rise building project in the Gaslamp Quarter. The proposed high-rise building requires an exemption from the sixty (60) foot height limitation by the Planning Director who, prior to taking action, must take into account comments from the Historical Site Board. This procedure is specified in Section 103.0407.A. of the San Diego Municipal Code ("SDMC") (not Section 103.0408.A. as specified in your memo).

Section 15025(c) of the State CEQA Guidelines provides:

Where an advisory body such as a planning commission is required to make a recommendation on a project to the decisionmaking body, the advisory body shall also review and consider the EIR or negative declaration in draft or final form.

The Historical Site Board is an advisory body and, pursuant to Section 103.0407.A. of the SDMC, is required to review and comment upon any requested exemption from the sixty (60) foot height limitation prior to action by the Planning Director. Therefore, the project review process you have outlined, which contemplates the preparation of an appropriate environmental document prior to consideration of this project by the Historical Site Board, will assure compliance with the foregoing requirement of CEQA.

You go on to ask whether a workshop could be held by the Historical Site Board to review the proposed building and discuss the philosophical context of the Board's opinions and concerns. Such a workshop would be acceptable provided the draft or final environmental document is presented to the Board at the time the workshop is conducted. In our opinion, there would be

noncompliance with CEQA without the benefit of the draft or final environmental document at the workshop for the Board to consider.

You also asked whether the Historical Site Board "review and comment" requirement means that the Board has to provide a recommendation to the Planning Director? "Comment" is defined as a critical observation, interpretation or expression of opinion. "Recommendation" refers to an action which is advisory in nature rather than one having any binding effect. *People v. Gates*, 41 Cal.App.3d 590, 599 (1974). As you are aware, the Historical Site Board is an advisory board created pursuant to Section 43(a) of the Charter of The City of San Diego and as such would be merely making recommendations rather than making a decision which had a binding effect. Therefore, we feel that the concept of reviewing and commenting is conceptually the same as the role the board fulfills as a Charter Section 43(a) advisory board.

Finally, you asked for a brief discussion respecting Board member contacts outside the hearing with individuals wishing to discuss projects or permits which the Board will be required to act upon. These types of contacts are commonly referred to as ex parte communications. The rule respecting ex parte communications is: Contacts, oral or written, between anyone and a member of the City Council, a Council committee, or any City board or commission are inappropriate with respect to any quasi-judicial matter to be considered by the Council, committee, board or commission.

By saying a communication is inappropriate, it is meant that it may be the basis of a judicial determination that due process has been denied, with the consequent invalidation of the action taken. Invalidation, damages, costs and attorney's fees could be assessed because of any such judicial determination.

A matter is quasi-judicial when the action to be taken is "essentially judicial." Where an agency is required to (1) hold a public de novo hearing, (2) consider the evidence adduced and then, (3) in its discretion, allow or disallow requested permits and make written findings in support of its determination, the process has been held to be "quasi-judicial". Similarly, an action has been held to be quasi-judicial when it requires an agency to apply a general rule to a specific interest, such as a

zoning affecting a single piece of property, a variance or a conditional use permit. The fundamental factor is fairness in cases in which specific governmental action is proposed to be taken with respect to specific private property.

In our view, the Historical Site Board does not act in a quasi-judicial capacity when it conducts a hearing pursuant to

Section 103.0407.A. because the Board is acting in an advisory capacity and cannot grant or deny the height exemption.

However, it is also our view that the Board acts in a quasi-judicial capacity when it acts to designate a site as historical or when the Board objects to the issuance of a permit for the demolition, substantial alteration, or removal of a designated historical site as provided for in Section 26.02 of the SDMC. In such circumstances, the rule respecting ex parte contacts is applicable.

Should you have any further questions regarding this matter, please do not hesitate to call me.

JOHN W. WITT, City Attorney

By

Thomas F. Steinke

Deputy City Attorney

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